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U.S. Citizenship and Immigration Services

[redacted]

MAR 17 2004

FILE: WAC 02 056 51010 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for a Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a firm engaged in the sales, installation and repair of steam boilers. It seeks to employ the beneficiary permanently in the United States as a steam boiler and equipment mechanic. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and asserts that the director failed to adequately review the petitioner's financial circumstances.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) also provides in pertinent part:

> (2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is January 12, 1998. The beneficiary's salary as stated on the labor certification is $18.63 per hour or $38,750.40 per year based on a 40-hour week. The visa petition indicates that the petitioning business was originally established in 1987. It is organized as a corporation.

The petitioner initially submitted no evidence of its ability to pay the beneficiary's wage offer of $38,750.40. On March 15, 2002, the director instructed the petitioner to submit copies of its annual reports, audited financial statements, or copies of its original signed federal tax returns with all schedules and attachments.

In response, counsel for the petitioner submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 1998, 1999 and 2000. They reflect that the petitioner files its taxes based on a standard calendar year. The response also included evidence indicating that the petitioner had applied for an extension of time to file its 2001 tax return from the Internal Revenue Service.

The information set forth on the petitioner's 1998 corporate tax return reflects that it declared an ordinary income of $58,828. The 1999 tax return shows that the petitioner had $60,693 in ordinary income. For both 1998 and 1999, the petitioner's ability to pay the beneficiary's proffered wage of $38,750.40 was established because its ordinary income exceeded the amount needed to pay the beneficiary's proposed salary.

The petitioner's 2000 corporate tax return indicates that the petitioner declared $6,835 in ordinary income. Schedule L of the tax return reveals the petitioner's current assets and current liabilities. Current assets were $6,710 and current liabilities were -$11,000. The difference of -$4,290 is the value of the petitioner's net current assets at the end of that year. In reviewing the petitioner's ability to pay the proffered wage, CIS will consider net current assets in addition to net income because it reflects the amount of liquidity that a petitioner has as of the date of filing. It represents the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet. In this case, for the year 2000, neither the petitioner's ordinary income of $6,835, nor its net current assets of -$4,290 was sufficient to cover the beneficiary's wage offer of $38,750.40.

The director requested further evidence from the petitioner on August 2, 2002. The director instructed the petitioner to submit evidence relating to its ability to pay the proffered wage for 2001. The director again advised the petitioner that the evidence could be offered as annual reports, audited financial statements, or copies of the original signed federal tax returns.

Counsel's response provided the petitioner's 2001 corporate tax return. It reveals that the petitioner had $58,537 in ordinary income, which demonstrated the petitioner's ability to pay the proposed wage during that year.

The director's denial, however, concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage beginning at the visa priority date. The director found that neither the petitioner's ordinary income, or its net current assets during the year 2000 was sufficient to show the petitioner's ability to pay the beneficiary's proffered wage.

On appeal, counsel explains that the dip in the petitioner's business in 2000 was due to unusual circumstances. Counsel argues that the principle enunciated in *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) should be applied to approve the visa petition in the instant case. *Matter of Sonegawa* is applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. It relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturier.

In this case, counsel asserts that the petitioner's owner sought to expand his business into Mexico in the latter part of 1999. He set aside profitable ventures while he attended to this expansion. It ultimately failed to prove successful. The petitioner's owner closed the office in Mexico and returned his focus to his U.S. operations, which rebounded. By way of proof of these facts, counsel submits copies of five work bids

describing services to be performed by the petitioner for various customers. They cover a period from January 19, 2000 to June 13, 2000. There is no evidence provided that these bids were retracted or set aside due to the petitioner's other activities. Although this raises a question as to why the petitioner's owner would submit bids for work in the U.S. if he intended to devote his time to another venture, it hasn't been clearly answered by this evidence. Counsel also submits various documents typed in Spanish. They are not accompanied by English translations.

While the petitioner's Mexican business venture may appear to be within the parameters of the type of short-term unique business hardships envisioned by *Sonegawa,* counsel's assertions do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988). The petitioner's owner has offered no corroboration of this argument. Moreover, we cannot conclude that the unidentifiable documents typed in Spanish offer any additional credible support. It is noted that they fail to comply with the provisions of 8 C.F.R. § 103.2(b), which requires a certified English translation for any foreign language document submitted to CIS.

Counsel further argues that the petitioner's ability to pay the beneficiary's wage offer would be demonstrated if depreciation and other expenses shown on the petitioner's 2000 corporate tax return were added back to the petitioner's net income. No authority is cited for this proposition. In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava,* 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman,* 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh,* 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983). It is also noted that depreciation, as the decreased value of the assets of a business, is considered to be a relevant factor in determining the financial viability of the business and will not be added back to a petitioner's net income. *Chi-Feng Chang v. Thornburgh,* 719 F. Supp. at 537.

Finally, counsel argues that if the petitioner had employed the beneficiary in 2000, then the monies expended for outside labor as shown on the corporate tax return would have been available to pay the beneficiary's salary. While the record indicates that the petitioner allocated $12,124 for some type of outside labor, there is no first-hand evidence that the petitioner paid a contract laborer to perform the same duties as the position of steam boiler and equipment mechanic described on the approved labor certification. An unsupported statement cannot meet the burden of proof in this proceeding. *See Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972). Even if counsel's argument has merit, when the $12,124 is added to the petitioner's 2000 net income of $6,835, the resulting sum of $18,959 would have been insufficient to pay the proffered wage of $38,750.40.

Accordingly, based on the evidence contained in the record and after consideration of the information and arguments presented on appeal, we cannot conclude that the petitioner has demonstrated its continuing ability to pay the proffered salary as of the priority date of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.